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No. 06-1294

FILED
MAY 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ROBUR OTERO CARRASQUILLO, MARÍA T. NEGRÓN CEDEÑO AND THE CONJUGAL PARTNERSHIP FORMED BETWEEN THEM AND JENNIFER OTERO M. NEGRÓN,
Petitioners,

v.

PHARMACIA CORPORATION; PFIZER PHARMACEUTICALS; ZAIDA SANABRIA IN HER OFFICIAL AND PERSONAL CAPACITY; COMPANIES X, Y, X, JANE DOE AND JOHN DOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

Carl Schuster
Counsel of Record
Lourdes C. Hernández-Venegas
SCHUSTER AGUILÓ LLP
PO Box 363128
San Juan, Puerto Rico 00936-3128
(787) 765-4646
(787) 765-4611 telefax
Counsel for Respondents
Pfizer Pharmaceuticals LLC,
Zaida Sanabria

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

I. Can a Circuit Court base its decision on appeal on issues not briefed by the parties, when the record below is sufficiently developed and grounds for the decision can be found in it?

II. Is there any conflict between the Circuits regarding conflicting language between an ERISA-covered plan document with its summary plan description (SPD) originally drafted in English, and an erroneous translation of said document into Spanish?

III. Is a Circuit Court correct in disregarding the Spanish translation of an SPD in favor of the English version of the plan and its SPD when the English language documents show the true intent of the drafter and application of the Spanish language translation of the SPD would result in an absence of uniform application of the plan across sites in different states?

IV. Are claims for damages for fraudulent inducement / fraudulent concealment and for intentional infliction of emotional distress preempted under ERISA where the claims are based on alleged actions which result in a participant's failure to obtain benefits under an ERISA-covered plan?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondents Pfizer Pharmaceuticals LLC and Zaida Sanabria state as follows:

1. All interested parties to this proceeding are identified in the caption.

2. Effective January 1, 2004, Pharmacia & Upjohn Caribe, Inc., incorrectly identified as both Pharmacia Corporation and Pfizer Pharmaceuticals ("Pharmacia"), became Pfizer Pharmaceuticals LLC. Pfizer Pharmaceuticals LLC is a limited liability company organized and existing under the laws of the state of Delaware. It is an indirect wholly owned subsidiary of Pfizer Inc,, a publicly held corporation whose stock is publicly traded in the New York Stock Exchange.

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STATEMENT OF THE CASE

A. Brief Procedural Background

On June 11, 2003, petitioners Robur Otero Carrasquillo ("Otero"), María T. Negrón Cedeño, the conjugal partnership formed between them and Jennifer Otero M. Negrón filed a complaint against respondents, alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., as well as supplemental claims for intentional/negligent infliction of emotional distress and fraudulent inducement/ fraudulent concealment under Article 1802 of the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, § 5141 ("Art. 1802"), and one claim for invasion of privacy under Puerto Rico's Constitution. Respondents filed their answer to the Complaint on January 7, 2004.

After prolonged discovery by both parties, on January 19, 2005, respondents filed a Motion for Summary Judgment. On February 25, 2005 petitioners filed their Opposition. Respondents filed their Reply on April 11, 2005. Petitioners filed a sur-reply on May 9, 2005.

On August 16, 2005, the District Court issued an Opinion and Order and a Judgment, whereby it dismissed petitioners' ERISA claim for benefits on its merits, as well as all of their state law claims on ERISA preemption grounds, except for their claim for invasion of privacy under the Puerto Rico Constitution. On the other hand, the District Court imposed a $2,500 penalty under ERISA against Pharmacia, for failure to timely provide petitioners with certain requested information.

On October 12, 2005, petitioners appealed before the United States Circuit Court of Appeals for the First Circuit ("First Circuit"). After the parties filed their respective briefs, on October 6, 2006, the First Circuit affirmed the District Court's Judgment. Petitioners requested a rehearing en banc, which was denied by the First Circuit on December 26, 2006. The instant petition ensued.

B. Factual Background

Otero worked for Pharmacia since 1973. Throughout his employment, Otero worked as a Microbiologist in the Fermentation Plant at the facility in Arecibo, Puerto Rico. His position title was Research Associate III.

On or about February 18, 2000, during a meeting with the Fermentation Plant employees, it was announced that, as a result of a Company business decision, the Fermentation Plant would close, *and that the fermentation process would be transferred to an affiliate's plant in Kalamazoo, Michigan.* Subsequently, frequent meetings were held with affected employees in connection with several related matters, including their future with the Company. During said meetings, employees were assured that the Company would identify and assign similar positions for all affected employees. The intention of the Company at that time was to provide all displaced employees with a position elsewhere on the Arecibo site. As part of these orientations, employees were also told that, even if they were assigned to other positions in the Company, they would remain in the Fermentation Area as long as their positions were needed. The newly assigned position would then remain reserved for the employee until his or her position at the Fermentation Area was eliminated.

At all times relevant to the instant claim, Pharmacia's parent Company, Pharmacia & Upjohn Company (hereinafter referred to as "Corporate"), sponsored a "Separation Payment Plan" ("SPP"). The purpose of said plan was "to alleviate in part or in full financial hardships which may be experienced by certain of those Employees of [Pharmacia & Upjohn], and certain of its affiliates. . . whose employment is terminated, where the termination is initiated by the Company. In essence, benefits under the Plan are intended to be supplemental unemployment benefits." SPP, Section 1.02. The amount of benefits was based on the employee's base pay at the time of his or her termination and his or her years of service.

Under the SPP, eligibility for benefits was reserved for employees "whose services are terminated by reason of Job Elimination, Job Restructuring, or Non-Performance". On the other hand, in its relevant part, the SPP provides that employees would not be considered to have been terminated by reason of a job elimination, job restructuring or non-performance, when their cease in employment was due to resignation or "a transfer to an affiliated business, the sale of Pharmacia & Upjohn, Inc. or any portion thereof, or the outsourcing of a division, department, business unit or function where the Employee has been offered a Comparable Position with the Company or the new employer". SPP, Section 3.1.

In light of the announcement of the impending closing of the Fermentation Plant, Pharmacia requested that Corporate apply the SPP to the Fermentation Plant's employees by treating the closing as a reorganization. This, inasmuch as Pharmacia interpreted it as such, since the fermentation process was being transferred to another legal entity. Indeed, during a meeting with Fermentation employees in September of 2000, they were informed that Corporate had decided to approve the extension of the SPP to the Fermentation Plant's closing, and were

provided highlights of the program. When the announcement was made, however, the summary plan description for the SPP had yet to be translated into Spanish. Therefore, the affected employees did not receive a copy of said document at that time.

On or about February, 2001, Otero, as well as all the Fermentation plant employees, received a Spanish translation of the summary plan description of the SPP (hereinafter referred to as "the Spanish translation of the SPD"). Just as the SPP defined the term "Comparable Position"[1], the SPD defined the term "Similar Position" as employment with the Company or the successor employer in which the employee has substantially similar level of responsibility, as determined by the Company, to that which he or she had in his or her former position with the Company, which requires the same level of skills and a similar compensation (within 10%), and whose work location is no more than 50 miles from the location of his or her former job. The determination as to what was a comparable or similar position was made by the Company, and specifically, Human Resources. The comparison of positions was based on job requirements, accountabilities, salary and banding, based on the job description of the position, also known as role profile of the position. In addition, the term "lateral movement" was defined as a movement that involves no change in salary, band or grade. The Company considered this synonymous with a similar or comparable position.

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[1] The SPP defines a "comparable position" as "employment with the Company or a successor employer in which the individual's level of responsibilities is substantially similar, as determined by the Company, to the individual's immediately prior position with the Company, requiring similar skill levels and offering similar pay (within 10%) and in which the Employee is not asked to move his or her principal business location more than 50 miles".

Inasmuch as the Company considered the transfer of the Fermentation operations to its affiliate in Kalamazoo a "transfer to an affiliated company of a part of the Company", under the terms of the SPP, Corporate interpreted the Plan to allow for benefits only when an employee was not offered a comparable position with the Company. Indeed, Fermentation employees were told that, if they were not interested in remaining employed with the Company, they should so indicate, and the Company would not "pursue getting them a comparable position". Therefore, as the positions at the Fermentation plant were eliminated, those who had a comparable position would be transferred to it, while those who did not have a comparable position would be "exited" from the Company.

When the time came to "exit" for an employee or a group of employees with SPP benefits because their position was no longer needed and they did not have a comparable position, the Company would contact Corporate in order for the exit process to be completed. Corporate would then "open a window", which was a time period of 60 days, ending on the employee's termination date. Therefore, the employee would be notified of his or her termination date 60 days in advance, and would then have said period to complete all necessary paperwork, which consisted of the execution of a release agreement which required a period of 21 or 45 days for the employee to consider the same, pursuant to the requirements set forth in the Older Workers' Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626. It must be noted that, contrary to petitioners' allegations, there is no such thing as a "windows program". A "window" is a commonly used business term to describe an *employer's* internal administrative process for exiting an employee, be it through retirement or separation. It has nothing to do with actual entitlement to benefits under any plan, but instead focuses on the process the Company follows, in its role as the *employer*, for an employee to be able to exit employment,

having completed all exit processes which, in this case, includes considering, signing and not revoking, a release agreement in exchange for payment of separation benefits, once the employee is, in fact, entitled to benefits under the plan.

Andrés Lugo, Otero's supervisor at the time, who was also a potential beneficiary of the SPP, received a copy of the summary plan description in February 2001, along with Otero. Upon receipt of said document, Lugo limited himself to reviewing the table of benefits. However, he did not read the document in detail, inasmuch as he was interested in remaining with the Company. Lugo was not a plan administrator or fiduciary, nor did he make any decisions whatsoever in connection with eligibility for benefits under the same. On the other hand, Zaida Sanabria also knew of the existence of the SPP, but was not familiar with its terms, and never saw the document. This, inasmuch as, at the time the Spanish translation was distributed, the group of employees that Sanabria was in charge of at that time were not interested in leaving the Company. Sanabria never saw the Spanish translation of the SPD. Sanabria also lacked any authority whatsoever over the SPP, nor over the process to determine eligibility for benefits under the same.

Sometime in mid-March, 2001, during a meeting held with the Fermentation employees, several movements in the area's management personnel were announced. As a result of these movements, Sanabria took over as Manager of the Fermentation area, in addition to her other assigned areas. She then became Otero's direct supervisor.

On June 20, 2001, Otero was informed that he had a guaranteed position as a Microbiologist III in the Quality Control Laboratories and, subsequently, it was announced that

he was to be included in the "headcount" for January 2, 2002, as Microbiologist III in the Quality Control area.

The job description/role profile for the Research Associate III and Microbiologist III have the same rating, in terms of band (both are Band B), educational requirements (both require, as a minimum, a Bachelor's Degree in Science and four (4) years of experience in the field, technical competencies, leadership and customer/human relationship skills and accountabilities, also known as "decision boundaries"). Therefore, the Company considered them to be "comparable positions". Notwithstanding, Otero avers that, at the time this announcement was made, *he* believed the assignment to said position to be a demotion. On August 27, 2001, during a staff meeting, Sanabria gave Otero a designation letter which confirmed that, effective January 2, 2002, he would be assigned to the Quality Control Microbiology Laboratories, as a Microbiologist III. He was also told that, due to business needs and the closing of the Fermentation Area, his current position would continue until the end of December, 2001.

Otero was not happy with his designation and, on November 5, 2001, he handed Sanabria a communication whereby he expressed that he wished to exit the Company with SPP benefits. This request was the first time that Sanabria became aware of Otero's interest in SPP benefits. According to Otero, at that time Sanabria expressed that she believed it was too late for him to request such benefits. Notwithstanding, Sanabria informed Linda Díaz, who was the main liaison with Corporate regarding the SPP, regarding this matter.

This was also the first time Díaz became aware of Otero's interest in obtaining SPP benefits. She, in turn, called Julie Uebler at Corporate, who was her contact for the SPP. She informed Uebler of Otero's request and, upon Uebler's inquiry,

Díaz informed her that Otero had been placed in what the Company understood was a comparable position. Based on this information, Uebler informed Díaz that Otero was not eligible for SPP benefits.

On November 6, 2001, Díaz informed Sanabria by email regarding the results of her conversation with Uebler. On November 9, 2001, as soon as Sanabria became aware of the email, she forwarded the same to Otero. On November 12, 2001, upon his arrival at work, Otero read Sanabria's emails regarding his SPP inquiry, which confirmed her initial expressions regarding the SPP benefits.

On that same afternoon, Otero went to the Company's Human Resources Offices to speak to the Human Resources Manager, Carmen Calcaño, regarding his SPP inquiry. Otero alleges that, when he attempted to deliver a letter he had drafted, he felt his hand begin to shake, fainted, and fell backwards, losing consciousness. Upon regaining consciousness, Otero decided to stay in Calcaño's office and speak to her regarding his inquiry. Calcaño indicated to Otero that he had applied for SPP benefits too late. On November 13, 2001, at Otero's request and after consulting Díaz, Calcaño confirmed to him that, in fact, he was too late to be eligible to receive SPP benefits.

November 13, 2001 was Otero's last day of active employment with the Company. Subsequently, he was admitted to the hospital for a back operation, was hospitalized for several weeks, and later began receiving long term disability (LTD) benefits. Otero is currently still receiving LTD benefits.

Petitioners' request for writ of certiorari is limited to four arguments[2], to wit: (1) that the First Circuit erred in affirming the District Court's decision on grounds not raised, or briefed by, either of the parties; (2) that the First Circuit erred in basing its decision on the SPP plan document and not on an erroneous Spanish translation of its SPD, thus creating an alleged conflict between Circuits; (3) that the First Circuit went against its own precedent when it avowed respondents' alleged articulation of different reasons for the denial of Otero's SPP benefits; and (4) that the First Circuit erred in determining that petitioners' claims for fraudulent inducement and intentional infliction of emotional distress were preempted by ERISA. As will be demonstrated below, however, Petitioners' position falters on all fronts. Therefore, Certiorari should not be granted by this Honorable Court.

CERTIORARI SHOULD NOT BE GRANTED

A. Standard for Granting Certiorari

"Review on a writ of certiorari is not a mater of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Petitioners have not presented any compelling reason for this Honorable Court to exercise its discretionary jurisdiction over their attempted appeal of the dismissal of their claims. Indeed, as will be demonstrated below, their key complaints, regarding

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[2] Petitioners make no mention in their submission before this Honorable Court regarding several arguments brought forth before the First Circuit Court of Appeals, to wit, the standard for reviewing Pharmacia's decision, as well as the amounts imposed by the District Court against Pharmacia for daily statutory penalties. Thus, these issues are not before this Honorable Court, and should be considered waived.

the basis for the First Circuit's decision, as well as the merits of their claims, were more than adequately addressed by the Courts below, and should not be disturbed by this Honorable Court.

B. The First Circuit did not go against this Honorable Court's decision in Singleton v. Wulff: the First Circuit's decision was based on a record that was sufficiently developed and grounds to support the decision are found in it.

Petitioners are entirely correct in that this Honorable Court has held that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 U.S. 106, 120 (1976). Notwithstanding, petitioners have misconstrued this Honorable Court's holding. At the outset, it must be noted that, in Wulff, this Honorable Court refused to establish that this "general rule" is set in stone:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. *We announce no general rule.* Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . ., or where "injustice might otherwise result". . . .

Singleton v. Wulff 428 U.S. at 121, quoting Turner v. City of Memphis, 369 U.S. 350 (1962) and Hormel v. Helvering, 312 U.S. 552 (1941). (Internal citations omitted).

Moreover, the set of procedural facts present in Wulff, upon which this Honorable Court made its holding, are clearly distinguishable from those of the instant case. In Wulff, the case was dismissed upon a pre-answer motion to dismiss. Therefore, there had been no answer to the complaint, scant discovery, and no opportunity for the parties to raise all issues they felt necessary, with a consequent decision on the merits of the claim. Therefore, this Honorable Court held that, under those circumstances, the Eighth Circuit Court of Appeals had erred in deciding upon *the merits* of plaintiff's claims. In the captioned case, however, the parties engaged in full and prolonged discovery, followed by an exhaustive dispositive motions stage, in which all relevant documents were included, and where a full record was presented. It was precisely in a document found in the record which was before the First Circuit, that said forum found the justification for its reasoning. Therefore, petitioners' reliance on Wulff is misplaced.

On the other hand, the First Circuit's actions are wholly consistent, not only with the exercise of discretion avowed by this Honorable Court in the quoted passage above, but also with "the well settled rule that the appellate court may affirm the judgment of the district court on any independently sufficient ground." Pediatricians, Inc. v. Provident Life & Acc. Ins. Co., 965 F.2d 1164, 1173 (1st Cir. 1992), quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7 (1st Cir.1990); Garside v. Osco Drug, Inc., 895 F.2d 46, 48-49 (1st Cir.1990); Polyplastics, Inc. v. Transconex, Inc., 827 F.2d 859, 860-61 (1st Cir.1987). See also Thigpen v. Roberts, 468 U.S. 27, 30 (1984) ("we may affirm on any ground that the law and the record permit and that will not expand the relief granted below."); J. E. Riley Inv. Co. v. C.I.R., 311 U.S. 55, 59 (1940); U.S. v. Levine, 477 F.3d 596, 601 (8th Cir. 2007) ("[i]t is a well-settled principle that we may affirm a district court's judgment on any basis supported by the record"), quoting

United States v. Pierson, 219 F.3d 803, 807 (8th Cir.2000); In re Plunk, 481 F.3d 302, 305 (5th Cir. 2007) (same); Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 205 (2nd Cir. 2006) (the Court of Appeals may affirm summary judgment on any basis for which there is sufficient support in the record, including grounds not relied on by the district court); In re First Alliance Mortg. Co., 471 F.3d 977, 995 (9th Cir. 2006) (same); Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004) ("we are not wedded to the trial court's reasoning, but, rather, may sustain its decree on any ground made manifest in the record"); In re Wiencko, 99 Fed.Appx. 466, *3 (4th Cir. 2004) (unpublished) (same); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir.1999) (same). City Mgmt. Corp. v. U.S. Chem. Co., Inc., 43 F.3d 244, 251 (6th Cir.1994) (same).

Finally, petitioners conveniently fail to acknowledge that *the issue* decided by the First Circuit, to wit, whether Otero was entitled to SPP benefits under the terms of the plan after being designated to a comparable position, albeit on different grounds than those relied upon by the parties or by the District Court, has always been in discussion in the case at bar. It was, precisely, the central issue to be decided upon by the various fora which have considered the case. The First Circuit made an independent, *de novo* review of the summary judgment record in the case, as it is obligated to do, and decided upon the documentary evidence before it, which established the uncontested facts. Indeed, it was precisely petitioner's reading, interpretation and reliance on the Spanish translation of the SPD which led to the First Circuit's review of the relevant documents, and to the decision that the original English SPP document controlled. Thus, petitioners cannot come now, when faced with an adverse decision, and allege that the issue was not before the First Circuit. A review of the record on appeal suffices to ascertain that the First Circuit's decision

most certainly was supported by the evidence in the record before it. Accordingly, it is respectfully asserted that this Honorable Court should decline to consider petitioners' attempted appeal on these grounds.

C. The First Circuit's decision does not create any conflict with other Circuits, which have *not* decided whether an *erroneous translation* of an SPD controls over the plan document.

Petitioners claim that the First Circuit's decision "creates a conflict with other Circuits over whether [sic] which document governs when the employer drafts an erroneous translation of an SPD". It is respectfully asserted that petitioners' argument is flawed as a matter of fact, and law. First and foremost, and petitioners' attempt at confusion notwithstanding, none of the cases cited in support of their position are even remotely related to erroneous *translations* of a summary plan description (SPD). Rather, all of the cases cited by petitioners presented conflicts between master plan documents and SPD's, where both documents were written in English. As a corollary, it must be noted that, in the case at bar, petitioners have not alleged, nor have they established, that there is any conflict in the language between the master plan document and the SPD. To the contrary, their allegation is that there is a conflict between the original SPP plan document, drafted in English by Corporate, and the eventual Spanish translation of the SPD which was circulated exclusively to the employees in the Puerto Rico Arecibo Fermentation plant. There is, quite simply, no other case law at this time regarding this issue, other than the First Circuit's decision in the case at bar.

Second, it is certainly uncontested that the SPP was sponsored by Pharmacia's parent company, Pharmacia & Upjohn (referred to throughout this brief as "Corporate"), to be

applied to "those Employees of [Pharmacia & Upjohn], and certain of its affiliates . . .".[3] SPP Section 1.02. (Emphasis ours). The SPP's language unequivocally indicates that it was meant to be applied to multiple sites, including sites in the continental United States, as well as the site where plaintiff worked in Arecibo, Puerto Rico. It is respectfully asserted that this Court's application of an erroneous *translation* into Spanish of an SPD, of which the original English version has otherwise been uniformly applied to other sites located stateside, would fly in the face of ERISA's primary goal of uniformity in the handling and interpretation of plan by plan administrators, especially when it comes to plans that are applied in sites in the several States. See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 17 (2004); Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141,148 (2001); Retail Industry Leaders Ass' v. Fielder, 475 F.3d 180, 191 (4th Cir. 2007) (noting ERISA's goal of establishing uniform, nationwide regulation of employee benefit plans); Hattem v. Schwarzenegger, 449 F.3d 423, 429 (2nd Cir. 2006); Berger v. AXA Network LLC, 459 F.3d 804, 814 (7th Cir. 2006).

In essence, then, acquiescing to petitioners' request would entail applying the SPP to a discrete group of participants in Puerto Rico in a different manner than the same plan is applied to participants anywhere else in the United States. Surely, this is contrary to the Congressional intent when establishing ERISA. The case at bar is not a typical case in which a drafter prepares a plan document and an SPD, both in English, which

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[3] This section, in turn, refers the reader to the definition of "Company"in the Plan, to wit, ". . . P&U and its affiliates that adopt the Plan with consent of the Oversight Committee". SPP Section 2.05.

conflict with each other. This case is one in which a plan administrator, whose vernacular is English, originally drafted a plan document, as well as an SPD, in English. Yet, subsequently, in an attempt to both extend the benefits afforded by the plan to Puerto Rico employees and to comply with ERISA's requirements to provide an SPD "written in a manner calculated to be understood by the average plan participant",[4] knowing that the vernacular of Puerto Rican employees is Spanish, commissioned a *translation* of the SPD *into Spanish*, with a resulting error committed by the drafter of the translation. Moreover, precisely because it was a Spanish translation of an original English language document, the Spanish SPD expressly indicated that "[t]his document is a translation into Spanish of the original document, written in English, *Pharmacia & Upjohn Company, Separation Payment Plan, SPD for Employees of Pharmacia & Upjohn Caribe, Inc.* Should there exist any discrepancy between this translation and the original document in English, *as a result of the translation of words and/or terminology*, or of the interpretation of content *in the translation*, the information in the original document will prevail. If you wish to obtain a copy of the original document in English, you may request it at the Department of Human Resources". Cover of the Spanish translation of the SPD. (Translation and emphasis ours).

This Honorable Court should therefore not apply the terms of the erroneous *translation* of the SPD, but should apply the terms of the English SPP document, from which the true intent of the original drafter of the plan can be ascertained. After all, "[t]he primary effort of [this Honorable Court's] inquiry should be to ascertain the intent of the parties or (in this case) of the

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[4] 29 U.S.C. § 1022(a)(1). See also Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995).

Plan drafter." Klebe v. Mitre Group Health Care Plan, No. 95-27281996, WL 405220, *1 (4th Cir. July 19, 1996) (unpublished disposition), quoting Glocker v. W.R. Grace & Co., 974 F.2d 540, 544 (4th Cir.1992). See also Citizens Ins. Co. of America v. Mid Michigan Health, 449 F.3d 688, 696, n. 7 (6th Cir. 2006) ("[T]he court must give effect to the intent which manifestly informs the language, despite technical shortcomings or hypothetical ambiguities in the language.", quoting Allstate Insurance Co., v. Knape, 147 F. Supp 2d 804, 809 (W.D.Mich.2001)); Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1233 (3rd Cir. 1991) ("when interpreting an ERISA severance plan, a district court should attempt to determine its intended meaning without construing it in favor of any party. Only if this factual inquiry proves fruitless should a court resort to constructions in favor of one party or another.").

Finally, and perhaps most significantly, although petitioners have showed an apparent inconsistency between the SPP and the Spanish translation of the SPD, and, at this stage of the proceedings, they have for the first time superficially alleged that Otero relied on this conflicting language in the SPD to his detriment, neither the uncontested facts nor petitioners' own allegations throughout the proceedings below support this contention. To those effects, whether applying a "detrimental reliance", or a "prejudice" standard, the fact is that most circuits agree that showing inconsistent language between a master plan document and an SPD, on its own, is not enough, and that it is necessary to establish that the participant also relied on said conflicting language, in some cases to his or her detriment. See Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51, 55 (1st Cir. 2001) ("relief is only appropriate if the participant demonstrates significant or reasonable reliance on the Plan Summary."); Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 111 (2nd Cir. 2003)

(applying a prejudice standard); Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 887-88 (8th Cir.1999) (either detrimental reliance or prejudice); Chiles v. Ceridian Corp., 95 F.3d 1505, 1519 (10th Cir.1996) (either detrimental reliance or prejudice); Andersen v. Chrysler Corp., 99 F.3d 846, 859 (7th Cir.1996) (detrimental reliance standard); Aiken v. Policy Mgmt. Sys. Corp., 13 F.3d 138, 141-42 (4th Cir.1993) (per curiam) (either detrimental reliance or prejudice); Branch v. G. Bernd Co., 955 F.2d 1574, 1578-79 (11th Cir.1992) (detrimental reliance standard); Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 n. 8 (3rd Cir.1991) (detrimental reliance standard); Govoni v. Bricklayers, Masons & Plasterers Int'l. Union of Am., Local No. 5 Pension Fund, 732 F.2d 250, 252 (1st Cir.1984) (either detrimental reliance or prejudice).

In the case at bar, as part of their Complaint before the District Court, as well as in their submissions before the First Circuit, petitioners made several specific allegations of reliance upon the SPD's terms, including that Otero was allegedly led to believe that he had until December 31, 2001 to request SPP benefits,[5] and that no one ever informed him of any changes to

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[5] Complaint, at ¶¶ 29 ("the express language of the SPP provided that its expiration date for affected employees to apply was December 31, 2001"), 62 ("[t]he SPP expressly provided that the deadline was December 31, 2001 and defendants knew that employees including plaintiff were making important retirement decisions relying on this information"), 63 ("[p]laintiff relied in [sic] the text of the SPP to select the benefits under the plan prior to December 31, 2001"). This allegation is betrayed by the SPD's own language, which only makes reference to December 31, 2001 as the date on which the SPP would *expire* as a plan. That is, that the SPP would *exist* until December 31, 2001.

this date.[6] Complaint, at ¶¶ 47 (". . .[n]o verbal or written disclosure from Pharmacia had been provided to him either changing, modifying or altering the SPP's application expiration date"), 64 ("[d]efendants failed to announce any changes to the Plan which resulted in plaintiff's lost [sic] of benefits").

At no point in the litigation below, however, did petitioners support any of their allegations on the portion of the Spanish translation of the SPD which is now in dispute. Indeed, in their Complaint petitioners repeatedly asserted that Otero considered the Microbiologist III position to which he was designated as a demotion, and not a comparable position to that which he previously held, to wit, Research Associate III. Complaint, at ¶¶ 44 ("[i]n October 2001, plaintiff was informed that the position he was confirmed had lower salary scale, less responsibilities, less professional status, etc. than the Fermentation Microbiologist position he had"), 52 (". . . defendant's false representations concerning that he would be secured in a [sic] similar duties, status, responsibilities, position"), 74 ("[d]efendants failed to offer plaintiff a similar job position while silently kept for them the change on the SPP's expiration date. . ."), 76 ("[t]he position (Microbiologist III), allegedly offered to the plaintiff constituted a demotion"), 85 ("[d]efendants concealed that the SPP date was changed in order for plaintiff to be left out without benefits and worst, a similar employment"), 106 ("[d]efendants not only concealed crucial information regarding plaintiffs' retirement benefits but

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[6] This allegation was subsequently rendered meaningless during litigation, since there were, in fact, no changes to the SPP, and petitioners simply misinterpreted its terms by assuming that they had until December 31, 2001 to "apply" for benefits, when in fact December 31, 2001 was actually the date on which the SPP would cease to exist altogether.

also, fraudulently represented to him that he would be situated in a 'similar position'. . ."). This, in clear reference to the SPP's exclusion of eligibility for benefits when a participant is given a "comparable position." However, at no time did they state, as they now posit, that the "comparable position" requirement of the SPP was not activated, or that it was not applicable to Otero because *he* was not transferred to an affiliated company. To the contrary, at all times throughout the proceedings below, including in the allegations of the complaint itself, petitioners quite simply argued that the position to which Otero was designated was not "similar" to the one he previously held, in essence conceding that the "comparable position" requirement was, in fact, applicable to him. Thus, from their own actions it is evident that it was not until now that petitioners began to "rely" on the faulty translation, in order to change their argument, and that, at no time prior to the First Circuit's decision, did they "rely" on this portion of the Spanish translation of the SPD.

In light of the above, it is evident that petitioners have not established any split in the Circuits, inasmuch as no court, other than the First Circuit, has considered the issue of conflicts between a plan document and a *translation* of its SPD. Moreover, on its merits, the application of the erroneous Spanish translation of the SPD would be contrary to ERISA's central goal of uniform application of benefits plans to all participants, especially across multiple states. Finally, petitioners have not been able to establish that they relied on the allegedly erroneous language of the Spanish translation of the SPD, to their detriment. Accordingly, this Honorable Court should decline to consider petitioners' attempted appeal on these grounds.

D. The First Circuit's decision in the case at bar is not contrary to its own precedent in Glista v. Unum Life Insurance Co. of America.

Petitioners assert that, in the case at bar, respondents provided different reasons to Otero for denying him SPP benefits, to wit, that "the so called 'windows program' had closed," and that he was ineligible to receive SPP benefits because he had been offered a comparable position with Pharmacia. Petitioners further emphatically assert that the First Circuit's upholding of respondents' actions is contrary to its own ruling in Glista v. Unum Life Insurance Co. of America, 378 F.3d 113 (1st Cir. 2004), inasmuch as "[p]lan administrators governed by ERISA must provide claimants with the specific reasons for a denial of claims and may not defend in court a denial of benefits on the basis of a different reason than that articulated to the claimant during the internal review process. Therefore, according to Glista, the reason for denying ERISA benefits cannot be modified by a plan administrator during a judicial proceeding". Petition for Writ of Certiorari, at 18. Regardless of how enthusiastically petitioners phrase their argument, however, as will be demonstrated below, the same is flawed, and should be disregarded.

Petitioners' argument seems to suggest that, in Glista, the First Circuit established a bright-line rule that a plan administrator cannot defend a denial of benefits based on a different reason than the one given to the claimant during the review process. Nothing is further from the truth. In Glista, the First Circuit was pellucid:

> We decline to adopt hard-and-fast rules as to either question . . . We also conclude that where a plan articulates *in litigation* an additional reason for denial

> of benefits that differs from the reasons articulated to the plaintiff, reviewing courts have a range of options available. . .

378 F.3d at 116. (Emphasis ours). From this passage it is evident that the First Circuit has, at no time, closed the door on considering, based on the facts of each specific case, whether a plan administrator may prevail *in litigation* on the basis of an eligibility reason which is different from the one provided to the claimant while in the midst of the internal review process. Therefore, petitioners' characterization of the First Circuit's decision in Glista is nothing more than yet another attempt to mislead this Honorable Court.[7]

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[7] Respondents must, at this juncture, demonstrate a glaring example of mischaracterization by petitioners, which is part of their discussion of this error. Before this Honorable Court, petitioners assert that "[t]he reason for the elimination of these employees' positions was due to the closing of the fermentation plant and this is an undisputed fact. Their positions were not eliminated as a result of a transfer to an affiliate [sic] business and if that was the case, none of these employees would have become eligible under the plan". Curiously, however, as part of their Complaint before the District Court, petitioners themselves made several references to the transfer of the Fermentation process to Pharmacia's affiliate in Kalamazoo, and the resulting impending termination of Otero's employment as a result of it. Complaint, at ¶¶ 21 ("On or about February 2000, Pharmacia informed the Fermentation Department's employees that the fermentation plant would be closed, *as it was going to be transferred to the United States*. Thus, plaintiff's position was going to be eliminated or terminated"), 24 (". . . several months after the announcement of the plant's transfer, plaintiff was maintained in the darkness [sic] as to whether these positions were supposedly available for him or not"). Respectfully, petitioners cannot come now and halfway allege that Otero's termination was a direct result of the closing of the Fermentation plant, without also

On the other hand, the facts in the case at bar are completely distinguishable from those in Glista. First, petitioners themselves allege, as part of their discussion of the facts, that in the case at bar Pharmacia had provided *to Otero* three different reasons for the denial of Otero's SPP benefits[8] in letters from Linda Díaz of December, 2001, June, 2003 and November, 2003, all *prior* to petitioners' filing of the complaint. Petition for Writ of Certiorari, at 5. In Glista, however, it was not until the onset of litigation, as part of a dispositive motion, that the plan administrator extended a reason for the denial of benefits that was different from its original reason. In reaching its decision, the First Circuit discussed each and every denial letter sent to plaintiff Glista, and noted that, on *none* of those previous occasions, did defendant Unum provide the reason it then attempted to bring forth in litigation. The First Circuit then held that, based on the facts of that case, Unum was barred "from raising the Symptoms Clause *for the first time in this litigation*". Glista, 378 F.3d at 129-131. (Emphasis ours). Thus, the First Circuit did not hold that Unum could not provide different reasons for its denial of benefits *during the internal review process* as petitioners would like to have this Honorable Court believe, but rather that it could not do so, in light of the specific facts of the case, at the *litigation* stage. Glista, therefore, is not applicable to the facts of the case at bar.

Finally, and most significantly, the uncontested facts of the captioned case show that, despite petitioners' fervent statements to the contrary, respondents never gave different

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acknowledging that the *reason* for the closing of the Fermentation plant was, precisely, its transfer to an affiliate in Kalamazoo.

[8] As will also be demonstrated below, this factual argument is betrayed by the uncontested facts.

reasons for the denial of Otero's SPP benefits. At this juncture, respondents are once again forced to discuss the now infamous "windows". Petitioners make much ado about a supposed "windows program" that Otero was allegedly not informed of. However, once the wheat is separated from the chaff, it is evident that their proposition is without merit, and should be disregarded.

After Pharmacia announced the closing of the Fermentation Plant and the transfer of the fermentation process to Kalamazoo, employees were told that, even if they were assigned to other positions in the Company, they would remain in the Fermentation Area as long as their positions were needed. For those who did not have a comparable position, once his or her position at the Fermentation Area was eliminated, he or she would "exit" the Company.

Once the time came for an employee to "exit", Pharmacia would contact Corporate in order for the exit process to be completed. Corporate would then "open a window", a period of 60 days, ending on the date of termination of the employee, for the exiting employee to complete all necessary paperwork, including the execution of a release agreement.

Throughout the proceedings below, petitioners simply failed to contest this fact. Despite their not wishing to understand, the fact is that a "window" is an administrative term used for a period of time the Company must reserve for any person who will be exited to comply with several applicable laws, and specifically with the OWBPA. As such, once an employee *is eligible to leave and receive SPP benefits*, he or she must be given at least forty-five (45) days, pursuant to OWBPA, to consider and sign the Separation and Release Agreement the Company required in exchange for the benefits granted. See 29 U.S.C. § 626(f). In addition, the Company

must allow the employee seven (7) days after the agreement is executed in order to revoke the agreement if he or she so wishes. See 29 U.S.C. § 626(f). In this case, Pharmacia simply "rounded up" and allowed sixty (60) days for each exiting employee to complete this process. Of the aforementioned, and nothing else, consists the referred "window."Of course, since different employees exited at different times as their individual positions were no longer needed, each had a different "window" of sixty (60) days to complete the Release Agreement process. Hence the several "windows."

From the above, it is evident that the "windows" have nothing to do with eligibility for SPP benefits, nor with the moment in which a person becomes eligible. They only come into play once the employee is, in fact, eligible for SPP benefits and the date for his or her termination approaches, as an administrative way to manage the exit. By the time Otero finally requested SPP benefits on November 5, 2001, he was simply no longer eligible for them, inasmuch as he had been designated to a comparable position. Quite literally, at that point all employees, including himself, had either exited through the plan or had been placed in comparable positions and, thus, there was no need to open any additional administrative "windows" for him to exit. As such, he was quite simply too late, and was so informed, both personally by Pharmacia personnel back in November of 2001, as well as in the letters cited by petitioners of December, 2001, June, 2003 and November, 2003.

Respondents have, at all times, been consistent in their reasons for not awarding Otero SPP benefits. Petitioners have, quite simply, refused to accept that, and are attempting to create confusion where none exists, in order to lead this Honorable Court, as well as the courts below, astray. It is respectfully asserted that this Honorable Court should, as the ones below

have, refuse to be taken down that road. Therefore, certiorari should not be granted on these grounds.

E. The First Circuit did not err when it concluded that petitioners' claims for fraudulent inducement and intentional infliction of emotional distress are preempted by ERISA.

Petitioners attempt to convince this Honorable Court that their state law claims are not preempted by ERISA, by once again attempting to confuse. This, by creating an alleged conflict between the First Circuit's decision and its own previous precedent, when it comes to considering the allegations in the complaint in order to determine whether a claim is preempted. Upon review of the cited case law in support of this proposition, however, it becomes clear that the alleged "conflict" is imagined, or even fictional. To those effects, petitioners' use of Rosario-Cordero v. Crowley Towing & Transp, Co., 46 F. 3d 120, 125 n. 2 (1st Cir. 1995) is inapposite, inasmuch as nothing in the quoted section relates to this issue. Moreover, Danca v. Private Health Care, 185 F. 3d 1 (1st Cir. 1999), involved a controversy regarding the removability of a complaint from state court, when it only mentions state law. It was in this context that the First Circuit stated that the court must look beyond the face of the complaint, to determine whether it is, in effect, a claim under ERISA, as an exception to the well-pleaded complaint rule. See Danca, 185 F.3d at 4 ("Where a claim, though couched in the language of state law, implicates an area of federal law for which Congress intended a particularly powerful preemptive sweep, the cause is deemed federal no matter how pleaded . . . This exception to the well-pleaded complaint rule is called 'complete preemption.'), quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). Alas, petitioners' reliance on these cases is, as has been previously, misguided.

Moreover, this Honorable Court need only review petitioners' arguments in their Petition to ascertain that their state law claims are, indeed, preempted by ERISA. Their attempt at confusion notwithstanding, it is evident that, although they seek damages, petitioners' allegations of fraudulent inducement and intentional infliction of emotional distress stem, precisely, from Otero's failure to secure SPP benefits. To those effects, petitioners claim that the Company's "misrepresentations prevented him from applying in a prompt manner the SPP benefits", and that, "[a]s a result, he suffered an emotional breakdown which caused him severe injuries which are the damages he claims under article 1802". Petition for Writ of Certiorari, at 22. As a corollary, they allege that Otero "could not apply of [sic] severance benefits until all fermentation in Arecibo was completed", and that he was not informed of a supposed "change in the benefits' application deadline". Petition for Writ of Certiorari, at 24. To this, we can only ask: how would this Honorable Court know what a "prompt" application for SPP benefits was, without looking at the SPP plan? Why would it result in damages to Otero that he was allegedly told that he could not apply for benefits until the Fermentation process was completed, or that he was not informed of the supposed change in deadline, other than because of these alleged expressions or omissions he did not receive SPP benefits?

The answer to these questions is simple. Petitioners cannot escape their own argument to the effects that

> [t]he fraudulent inducement claims involve the intentional actions in inducing [Otero] to keep working under the false impression that he would be able to obtain the benefits of [an SPP] 'package' once the last production was over. The inducement was false and *plaintiff lost the benefits because he stayed working*

under Pharmacia's representations that he could not seek the benefits.

Petition for Writ of Certiorari, at 24. (Emphasis ours).

In essence, then, petitioners are attempting to obtain a remedy in damages instead of, or as a supplement to, the remedy set forth by ERISA Section 502(a)(1)(b), or even ERISA Section 510. The net result of the alleged misrepresentations by respondents was that Otero did not receive SPP benefits. According to petitioners, this event, in turn, led to damages. This, however, is an unattainable position. To those effects, while citing plenty of case law from some Circuits and several Districts in support of their position, petitioners curiously fail to acknowledge this Honorable Court's decision in Aetna Health v. Davila, 542 U.S. 200 (2004), which disposes of the controversy in the case at bar, in light of petitioners' own allegations. In Davila, this Honorable Court held, in no uncertain terms, that ERISA was the exclusive remedy available for claims such as these and that, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Id. at 209.

In light of the above discussion, it is respectfully asserted that both the District Court, as well as the First Circuit, correctly concluded that petitioners' claims for fraudulent inducement/fraudulent concealment, as well as for intentional infliction of emotional distress, were preempted by ERISA. As such, this Honorable Court should not consider petitioners' appeal.

CONCLUSION

As was demonstrated above, Petitioners' position is misplaced. The First Circuit acted correctly when it affirmed the District Court's Judgment in its entirety. As such, the instant Petition for Writ of Certiorari should be denied by this Honorable Court.

This 16th day of May, 2007.

Respectfully submitted,

Carl Schuster
Counsel of Record
Lourdes C. Hernández-Venegas
SCHUSTER AGUILÓ LLP
PO Box 363128
San Juan, Puerto Rico 00936-3128
Telephone: (787) 765-4646
Telefax: (787) 765-4611

Counsel for Respondents
Pfizer Pharmaceuticals LLC ,
Zaida Sanabria